IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Peter Blasi, et al.,	:	
	:	
Plaintiffs,	:	**Case No. 214-cv-0083**
	:	
vs.	:	**Judge Smith**
	:	
United Debt Services, Inc., et al.,	:	**Magistrate Judge Kemp**
	:	
Defendants.	:	

PLAINTIFFS' COMBINED MEMORANDUM CONTRA DEFENDANT EQUIFAX INFORMATION SERVICES LLC'S AND DEFENDANT NAME SEEKER, INC.'S MOTIONS TO DISREGARD THE AFFIDAVIT AND STRIKE THE SUPPLEMENTAL EXPERT REPORT OF EVAN HENDRICKS

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INTRODUCTION

Defendants Equifax and Name Seeker ask this Court to strike expert opinions on the grounds that they are incomplete and late. They are neither. Plaintiffs' expert properly and timely disclosed his affidavit containing his opinions, his reasons, and all facts on which he relied. At the time of the initial disclosure, the expert noted – as did Plaintiffs' counsel – the likely need to supplement the opinions based on voluminous outstanding discovery from both Equifax and Name Seeker. Equifax, in particular, had not yet produced thousands of pages of internal documents, including policy manuals and emails showing knowledge that the release of the Class' consumer reports was unauthorized. When those relevant documents became available, Plaintiffs immediately provided them to their expert, who in turn promptly supplemented his initial expert affidavit. But he did not change his opinions or offer new ones. He simply updated his initial disclosure to show how the additional discovery further supported his already well-known expert opinions.

Despite this necessary and expected supplementation by Plaintiffs, Equifax and Name Seeker now complain that they are somehow prejudiced. This is not true. First, discovery is stayed and the parties are currently agreeing on a revised schedule. Second, no trial date is set, allowing even more time for Defendants to respond to the expert. Third, Defendants have already deposed the expert for more than 7 hours, and Plaintiffs have offered to make him available again for further questioning, if need be. Notably, Defendants refused to question the expert on the thousands of pages of discovery they had just provided weeks before the deposition. Fourth, Defendants knew the supplementation was coming; there is no surprise. Fifth, the expert has not changed his opinions or offered new ones.

It is only because Equifax and Name Seeker withheld thousands of pages of discovery that Plaintiffs needed to supplement the expert report. Those Defendants should not be rewarded for such gamesmanship in discovery. Nor should Equifax be permitted to mischaracterize Plaintiffs' claims.

Specifically, Equifax asserts, "Plaintiffs' claims against Equifax are predicated on a fraud that was perpetrated *on Equifax* by another defendant in this case, AMG Lead Source ("AMG")." *See*, Defendant Equifax Information Services LLC's and Defendant Name Seeker Inc.'s Motions to Disregard the Affidavit and Strike the Supplemental Expert Report of Evan Hendricks ("Motions to Disregard") (Doc. 211 at 1.) (Doc. 214 at 1.) That is not true either. Discovery provided by Equifax has revealed that Equifax disregarded "red flag" facts alerting them that the purported end user was *not* authorized to obtain the Class's consumer reporting information. Equifax likewise knowingly disregarded *its own* internal procedures requiring verification of the entity requesting the Class's information, among other failures. 15 U.S.C. § 1681, *et. seq*. (Doc. 113 and 211-5.)

BACKGROUND

I. Plaintiffs' Claims

A. Plaintiffs' Claims Against Equifax and Name Seeker

Plaintiffs filed their Second Amended Complaint (Doc. 47) adding Name Seeker, Equifax and AMG as defendants on December 1, 2014, alleging New Wave Lending ("New Wave") and Benjamin Rodriguez obtained "prescreened lists" that included their names and addresses from Equifax, through its agent Name Seeker. (Doc. 47 at 1-3.) Name Seeker then resold the lists to AMG, who then in turn resold the lists to UDS. UDS then used the lists to market its debt relief services via direct mailing campaigns. Id.

Plaintiffs further alleged both Equifax and Name Seeker failed to discover New Wave was out of business. Id. at 10-11. The crux of Plaintiffs' claims against Equifax and Name Seeker are that neither implemented or followed reasonable procedures to ensure a permissible use of the reports that ultimately made it into UDS' direct solicitations. And Equifax and Name Seeker's failures were made knowingly or recklessly. Id.

Subsequent to filing the SAC, Plaintiffs learned New Wave and Benjamin Rodriguez were not aware AMG was using their names to procure prescreened lists. *See*, Benjamin Rodriguez deposition transcript ("Rodriguez Dep."), pp. 36-39, attached hereto as Exhibit 1. This testimony bolsters Plaintiffs' claims Equifax and Name Seeker acted knowingly or recklessly in providing prescreened lists, over the course of many years, to New Wave, a company that was out of business.

B. Statutory Framework Regarding Equifax and Name Seeker Liability

The FCRA imposes a duty on consumer reporting agencies ("CRAs"), such as Equifax and Name Seeker, "to maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b[1] of this title." 15 U.S.C. § 1681e(a). Further, CRAs are required to identify each person, including each end-user that procured a consumer report. 15 U.S.C. § 1681g(a)(3).

Plaintiffs allege UDS and AMG obtained prescreened lists from Equifax through its agent Name Seeker, without a permissible purpose. (Doc. 47 at 49-64) Equifax seems to believe that they and Name Seeker must actually participate in AMG's fraudulent scheme in order to be liable for violating the requirements of the FCRA. (Doc. 211 at 6.) The FCRA says otherwise.

[1] This section of the statute is regarding furnishing reports in connection with credit or insurance transactions that are not initiated by the consumer, which is typically the section under which prescreened reports are obtained.

Throughout its Motion to Strike, Equifax states it is a victim of AMG's fraudulent scheme. However, from June 2011 through May 2012, AMG's fraudulent scheme consisted entirely of a simple representation to Equifax and Name Seeker that it was seeking prescreened lists on behalf of New Wave, a company that had been out of business for approximately eighteen months. (Rodriguez Dep. at 168.) In short, the "sophisticated" fraud AMG was perpetrating upon Equifax and Name Seeker was predicated entirely on AMG's confidence Equifax and Name Seeker would not engage in any effort to verify New Wave was the end-user. AMG was right.

Based on the discovery provided by Equifax and Name Seeker, eventually Equifax and Name Seeker asked AMG for updated security agreements. After much delay, AMG purportedly provided the updated security agreements on New Wave's behalf. Approximately eighteen months after AMG began fraudulently procuring the prescreened lists from Equifax and Name Seeker, AMG was asked for an e-mail address for Benjamin Rodriguez, who originally registered New Wave with Equifax. The New Wave domain name was available because New Wave had been out of business for, at that time, approximately three years. As a result, Mr. Marasco purchased the domain name.

That is the "sophisticated" fraud which Equifax and Name Seeker found themselves victims. As stated above, the vast portion of AMG's plan was its knowledge Equifax and Name Seeker would do nothing to uncover its scheme. Equifax and Name Seeker obliged and, among other acts and omissions, never contacted Benjamin Rodriguez or followed their own policies and procedures to vet or verify the purported end-user, New Wave.

Even if AMG's plan were a complex, sophisticated web of fraud as Defendants would have this Court believe, the FCRA contemplates resellers and end-users will engage in such fraud. The FCRA properly places the burden of ferreting out and uncovering such fraud squarely on CRAs, such as Equifax and Name Seeker. The CRAs must maintain reasonable procedures designed to avoid violations of section 1681c and to limit furnishing consumer reports to the permissible purposes listed under section 1681b. 15 U.S.C. § 1681e(a).

C. Plaintiffs' Discovery Efforts

On May 23, 2014, the Court entered its first scheduling order. (Doc. 22.) On April 8, 2015, the Court entered a second scheduling order (the "Second Preliminary Pretrial Order"). (Doc. 68.) Under the Second Preliminary Pretrial Order, Plaintiffs' Rule 26 expert disclosures and expert report were due February 1, 2016. Id.

Plaintiffs propounded written discovery requests upon Equifax on May 20, 2015. Equifax responded on July 6, 2015. Equifax, however, did not produce any documents until September 29, 2015, at which time it produced approximately 1,500 documents.

Plaintiffs also propounded written discovery on UDS and Name Seeker on June 16, 2014 and July 22, 2015, respectively. Plaintiffs were engaged in a lengthy discovery dispute with UDS in an effort to obtain the list of putative class members. After repeated follow up, UDS eventually provided the list of putative class members in response to Plaintiffs' discovery requests.

Throughout the timeframe Plaintiffs were conducting written discovery with Equifax, Name Seeker and UDS, they were also communicating with AMG's counsel, Brian Melber, who initially took the position that because it was out of business AMG could not be a party to this lawsuit. Finally, on July 31, 2015, counsel for Plaintiffs spoke with counsel for AMG regarding AMG's position. Mr. Melber represented AMG had no assets and was out of business. During approximately the next ninety days, Mr. Melber and Plaintiffs' counsel discussed potential information Donald Marasco, owner of AMG, could offer Plaintiffs. And, during a telephone interview on October 21, 2015, Mr. Marasco discussed all substantive information contained in the Affidavit of Donald Marasco. Mr. Marasco also supplied documentation supporting the statements made in his affidavit. (Doc. 112 at 1-2).

Plaintiffs have been diligently engaged in discovery efforts throughout this case. While it is true Plaintiffs' counsel did not raise any issue with Equifax's discovery responses or document production prior to the expert disclosure deadline, Equifax affirmatively represented that "to the extent they exist (referring to the requested documents), it will produce non-privileged responsive documents during the relevant time period in its possession, custody or control." (Doc. 211 at Exhibit B, Equifax's Responses.) Equifax represented this in its response to Plaintiffs' Requests for Production of Documents in Requests 1, 2, 3, 6, 14, 15, 17, 18, 26 and 27. Id. Plaintiffs reasonably relied upon Equifax's representations and believed all documents responsive to their requests were produced. All responsive documents were not produced and Plaintiffs followed up accordingly. *See*, May 31, 2016 and June 14, 2016 e-mails from Mark Lewis, Plaintiffs' counsel, attached hereto as Exhibit 2.

In short, Plaintiffs were diligent in their efforts to obtain discovery throughout this case including all of 2015, to the expert disclosure deadline in February 2016. Equifax and Name Seeker are attempting to portray a narrative Plaintiffs sat on their hands until they missed a deadline, which is simply not true.

D. Plaintiffs' Claims Against Defendant UDS are Essentially Settled, Narrowing this Case to Plaintiffs' Claims Against Equifax and Name Seeker.

Plaintiffs and UDS are finalizing the details of a class wide settlement agreement that resolves all claims against UDS. Now, for all practical purposes, and pending Court approval of the settlement between Plaintiffs and UDS, this case is narrowed to Plaintiffs' claims against

Equifax and Name Seeker. Although AMG remains a party in this case, Plaintiffs previously dismissed their claims against AMG in return for cooperation and sharing relevant information.

II. The Hendricks Affidavit

As stated previously, the Affidavit includes Mr. Hendricks' statement of his opinion that, among other issues, Equifax and Name Seeker did not satisfy their own due diligence requirements as well as due diligence requirements imposed upon them by the FCRA when they failed to verify the end-user of the credit reports at issue in this matter. (Doc. 113.) Additionally, the Affidavit states that Mr. Hendricks reviewed the Second Amended Complaint, relevant discovery responses from UDS and Equifax, Affidavits of Donald Marasco and Benjamin Rodriguez, and relevant discovery responses provided by Benjamin Rodriguez. Id.

Hendricks further indicated he relied on all of the above-mentioned documents as well as his specialized knowledge, training, experience and education in forming his opinions. Id. Mr. Hendricks also attached a *curriculum vitae* referencing his qualifications, and publications dating beyond 10 years, as well as a list of all other cases in which he has testified as an expert at trial or by deposition dating beyond the previous 4 years. Id. Finally, Hendricks disclosed the compensation to be paid for the study and testimony in this case. Id.

III. The Supplemental Report

Throughout the year 2016, Plaintiffs diligently continued their discovery efforts. Among other efforts, Plaintiffs made themselves available for depositions on June 15, 16 and 17, 2016. Plaintiffs' counsel attended and questioned Benjamin Rodriguez at his deposition on July 15, 2016. Additionally, Plaintiffs scheduled depositions of Kirk Lanahan and David Melrose for June 8, and 9, 2016, respectively, in Texas. Mr. Lanahan's deposition went forward in Frisco, Texas. Mr. Melrose's deposition was cancelled the night before, at approximately 10:30 p.m., due to a medical emergency. Plaintiffs also attempted to schedule depositions of both the Equifax representatives and Name Seeker representatives on numerous occasions with no success.

In addition, Plaintiffs continued their efforts to obtain all written discovery required from Equifax in response to the May 20, 2015 discovery requests. (*See* Exhibit 2.) These efforts continued until discovery was stayed by this Court because of the discovery dispute between Name Seeker and AMG.

Equifax provided its first supplemental discovery responses, 364 additional documents, on July 14, 2016. Within this set of discovery Equifax finally produced its manual containing its purportedly reasonable procedures. Obviously, this evidence is crucial to Plaintiffs' claims Equifax did not implement and did not follow reasonable procedures. On August 12, 2016, Equifax produced its second supplemental responses (third production of documents), consisting of 2,173 additional documents. On September 21, 2016, over a year after Plaintiffs served discovery on May 20, 2015, Equifax issued supplemental answers to Plaintiffs' interrogatories.

Plaintiffs discussed the necessity of a supplemental report months ago pursuant to Equifax and Name Seeker's dilatory response to discovery. Plaintiffs' counsel notified Defendants' counsel a supplemental report would likely be necessary once the significant additional discovery was received from Defendants. Plaintiffs' counsel suggested on numerous occasions Defendants wait until discovery was produced before taking Mr. Hendricks' discovery deposition.

Despite Plaintiffs' counsel's suggestion to wait, defense counsel opted to proceed with Mr. Hendricks' deposition. During Mr. Hendricks' deposition, Plaintiffs' counsel gave Defendants' counsel the opportunity to question Mr. Hendricks regarding his opinions about supplemental discovery Plaintiffs received after the expert disclosure date but prior to his deposition. *See*, Evan Hendricks deposition ("Hendricks Dep."), pp. 17-19. Defendants' counsel declined to do so. Id. In his testimony, Mr. Hendricks comprehensively explained why he needed to prepare a supplement and ideally when he could prepare his supplement. Id. Based on Mr. Hendricks' statements, among other substantial communication with Plaintiffs' counsel, Defendants cannot now claim surprise.

After receiving and reviewing the latest set of supplemental discovery from Equifax, Plaintiffs requested Mr. Hendricks draft a supplemental report. On or about December 19, 2016, Mr. Hendricks completed the supplemental report. Plaintiffs then disclosed the report to Defendants' counsel. (Doc. 211-5, transmittal email and Supplemental Report, December 19, 2016.)

In response, Equifax's counsel requested Plaintiffs withdraw both the Affidavit and the Supplemental Report. (Doc. 211-6, email from J. Toro to B. Garvine, December 22, 2016.) Plaintiffs responded to Mr. Toro's letter on January 11, 2017, outlining the applicable case law and indicating Plaintiffs would not withdraw the Affidavit or Supplemental Report. (Doc. 211-8, letter from B. Garvine to J. Toro, January 11, 2017.) Equifax and Name Seeker filed similar motions to strike both the Affidavit and Supplemental Report.

ARGUMENT

I. Legal Standards Governing Disclosure of Expert and Supplemental Expert Report

A party must disclose the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703 or 705. Fed. R. Civ. P. 26(a)(2)(A). According to Fed. R. Civ. P. 26(a)(2)(B)(i) – (vi), unless otherwise stipulated or ordered by the court, the disclosure must be accompanied by a written report containing:

(i) A complete statement of all opinions the witness will express and the reasons for them;

(ii) The facts or data considered by the witness in forming them;

(iii) Any exhibits that will be used to summarize or support them;

(iv) The witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) A list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) A statement of the compensation to be paid for the study and testimony in the case.

The Federal Rules of Civil Procedure further contemplate, and in some circumstances require, a supplemental report or reports. Indeed, a party must supplement its expert report when required under Rule 26(e). Fed. R. Civ. P. 26(a)(2)(E). The duty to supplement extends both to information included in the report and to information given during the expert's deposition. Fed. R. Civ. P. 26(e)(2). Any additions or changes to the initial report must be disclosed at least 30 days before trial. Id.

II. The Hendricks Expert Affidavit Complies with the Rule 26 Requirements for Expert Reports.

Defendants concede Mr. Hendricks' Affidavit complied with Fed. R. Civ. P. 26(B)(iii) – (vi). Defendants' arguments are limited to sections (i) and (ii) of Fed. R. Civ. P. 26(B). Defendants argue instead that the Hendricks Affidavit fails to provide a complete statement of all opinions he will express and the reasons for them, and further that the Affidavit fails to provide the facts considered in forming his opinions. To the contrary, the Affidavit lists all the documents Mr. Hendricks reviewed in forming his opinions, which included the following:

1. The Second Amended Class Action Complaint filed by Plaintiffs;
2. The relevant discovery responses from United Debt Services and Equifax;

3. The Affidavits of both Donald Marasco and Benjamin Rodriguez;

4. The relevant discovery responses provided by Benjamin Rodriguez; and

5. Plaintiffs' Motion for Class Certification.

(Doc. 113.)

Mr. Hendricks then stated the following facts he ascertained based on his review of those specifically identified documents:

1. Equifax and Name Seeker provided consumer reports of approximately 166,000 Ohio residents;

2. UDS then used these same reports to direct mail market its debt services;

3. Equifax, Name Seeker and UDS systematically provided and/or used the consumer reports based on the same batch processing and methodology, including the wholesale manner in which Equifax and Name Seeker electronically provided the subject consumer reports;

4. And again, that UDS used the same reports, provided in the manner described above by Equifax and Name Seeker, to market its debt services;

5. Based upon his review of the referenced documents…Equifax failed to verify the end-user of the credit reports at issue in this matter.

Id. From the above facts, and a review of the above-referenced documents, Mr. Hendricks opined, to a reasonable degree of certainty, that Equifax and Name Seeker did not satisfy their own due diligence requirements or those of the FCRA. It is important to note that Mr. Hendricks' opinion is based on a review of a set of documents in order to determine the due diligence Equifax did not conduct. There is no document Mr. Hendricks can point out that states, "Equifax did not do what it was supposed to do." Mr. Hendricks could only arrive at such an opinion by reviewing all the relevant documents, noting the absence or omissions regarding Equifax's verification of the end-user, and then applying his experience and specialized knowledge about what the FCRA requires. This is exactly what Mr. Hendricks states within his Affidavit, thereby satisfying Fed. R. Civ. P. 26.

Equifax complains that Hendricks fails to explain exactly *how* it allegedly failed to comply with the FCRA. (Doc. 211 at 14.) However, the Affidavit clearly states Equifax did not satisfy its own due diligence requirements or the due diligence requirements of the FCRA "**by, among other act/omissions, failing to verify the end-user of the credit reports at issue in this matter**." (Emphasis added.) (Doc. 113 at ¶ 7.)

Defendants point to an email from Plaintiffs' counsel and a portion of Mr. Hendricks' deposition testimony where *Defense counsel* states the Affidavit is not a report. This is cherry picking on the part of Defendants in an attempt to create the impression that somehow Plaintiffs' counsel and their expert admit the Affidavit does not comply with Rule 26. No such admissions were made. In his deposition, Hendricks acknowledged that while his opinions, as presented in the form of the Affidavit, were not being presented in his typical manner, he was nevertheless comfortable that given the facts and information available to him at the time, he was able to render opinions in the case. (Hendricks Dep. at 73-75.)

In fact, Defendants were able to depose Hendricks for more than 7 hours based on his initial affidavit-report, further showing that they were sufficiently apprised of his expert opinions, the bases and reasoning for those opinions, and given the full opportunity to follow-up with questions about the report itself. Defendants challenged Hendricks on the substance and form of his opinions. Hendricks repeatedly responded that he believed his opinions in the Affidavit were accurate, competent and well-supported by the available discovery at the time he issued those opinions. Likewise, Hendricks repeatedly reminded Defense counsel that he would likely supplement his opinions based on the voluminous additional discovery, including thousands of documents produced only weeks before the deposition. (Hendricks Dep. at 72-75.) Plaintiffs' counsel had also advised Defense counsel about this reality both at the time of the initial affidavit-report and again before Hendricks' deposition.

Defendants' semantics argument about an "expert report" versus an "expert affidavit" belie this history and understanding. They argue form over substance. What matters is not the title of the document, but its contents under Fed. R. Civ. P. 26. Here, Hendricks testified that the "expert affidavit," as he called it, contained his written expert opinions, the basis of those opinions and his reasoning. Hendricks did not prepare his typical more lengthy report because Defendants failed to timely provide all the relevant discovery. But the fact remains that Hendricks' expert affidavit satisfies Fed. R. Civ. P. 26.

While there are factual complexities to this case, Hendricks' expert Affidavit shows that the overarching foundation for his expert opinion is straightforward. Through their knowing lack of due diligence, Equifax and Name Seeker failed to correctly identify and verify the end-user of the consumer reports at issue. This is undisputed: neither Equifax nor Name Seeker identified the purported end user who was obviously masquerading as another. Due to these failures, the Class' consumer reports were provided and used for impermissible marketing purposes in violation of federal law. Mr. Hendricks therefore opined, based on his experience and specialized knowledge, that Equifax did not satisfy its own due diligence requirements as well as the FCRA's requirements. (Doc. 113.) (Doc. 211-5.) This reasoning and the underlying data are revealed in the expert affidavit. Further, discovery provided by Equifax only confirmed these initial opinions, thus necessitating the expected expert supplementation.

III. The Supplemental Report is Proper and Timely under Fed. R. Civ. P. 26(a)(2)(E), Fed. R. Civ. P. 26(a)(3) and Fed. R. Civ. P. 26(e)(2).

Fed. R. Civ. P. 26(a)(2)(E) requires a party to supplement disclosures, including those of experts providing a written report, when required by Rule 26(e). Pursuant to Fed. R. Civ. P. 26(e)(2), a "party's duty to supplement [a written expert report] extends both to information included in the report and to information given during the expert's deposition." Fed. R. Civ. P. 26(e)(2) and 26(a)(3) govern timing for supplemental reports, and "[u]nless the court orders otherwise, [pretrial] disclosures must be made at least 30 days before trial." As such, supplemental disclosures are required to add to or correct written reports or testimony, and must be made at least 30 days before trial. *Allied Erecting Dismantling Co. v. United States Steel Corp.*, 2015 U.S. Dist. LEXIS 44702, *6, 2015 WL 1530648 (N.D. Ohio Apr. 6, 2015) (*Hamilton v. Breg*, 2010 U.S. Dist. LEXIS 81939, *6, 2010 WL 2889089 (S.D. Ohio Jul. 20, 2010) (holding a supplemental Memorandum was timely, and that "[f]ar from providing a new expert opinion," the Memorandum supplemented or corrected "information given during the expert's deposition" required by Fed. R. Civ. P. 26(e)(2)); *S. Elec. Supply v. Lienguard, Inc.*, 2007 U.S. Dist. LEXIS 53860, *6, 2007 WL 2156658 ("*Lienguard*") (stating, "[u]pdating incomplete materials must be done regardless of when the new information is uncovered") (Opinion by M.J. Kemp).

A. Hendricks' Supplemental Report is a Proper Supplement, not Prejudicial or Surprising.

The Rules require a party to supplement its expert's report if the party learns that the information disclosed is incorrect or incomplete. Fed. R. Civ. P. 26(e)(1)(A). "Thus, a 'supplemental' report pursuant to the Rule would consist of 'correcting inaccuracies, or filling interstices of an incomplete report based on information that was not available at the time of the initial disclosure." *See e.g. Keener v. United States*, 181 F.R.D. 639, 640 (D. Mont. 1998); *Kay v. American Nat'l Red Cross*, 2012 U.S. Dist. LEXIS 10638 *20, 2012 WL 261341 (S.D. Ohio Jan. 30, 2012) (even at the summary judgment stage if there is no direct contradiction with a prior expert affidavit, then the district court should not strike or disregard a second affidavit unless the court determines that the affidavit "constitutes an attempt to create a sham fact issue") (Opinion by J. Smith) (citing *Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986)).

It is clear from the plain language of Rule 26, additions to a report were not only contemplated, but in certain circumstances required. *Lienguard*, *supra*, 2007 U.S. Dist. LEXIS at *6. This is especially true when the supplement is based on information that was not available at the time of the initial disclosure. Here, much of the material became available after the initial disclosure deadline, and more importantly, is only offered by Hendricks to confirm and support his opinions. No new opinions are expressed in the Supplemental Report.

In his previous expert report-Affidavit, Mr. Hendricks opined that neither Equifax nor Name Seeker were sufficiently diligent in terms of ensuring the class members' consumer reports would only be accessed and used for a permissible purpose. In his subsequent deposition, and in his Supplemental Report, Mr. Hendricks discusses many warning signals, which he calls "red flags," that should have given Equifax and Name Seeker that a heightened level of awareness was required in identifying and verifying this particular end-user. Certainly, the Supplemental Report is more detailed, but the Supplemental Report consists of more facts, most of which became available after the initial disclosure deadline, supporting the same ultimate opinions.

Moreover, when the expert-affidavit was submitted, all of the documents containing the supplemental facts in support of Hendricks' opinions were requested in discovery *and* in

Defendants' possession, but withheld. Defendants gave written assurances that they would timely supplement discovery, but failed to do so. The Supplemental Report, therefore, was only necessary *because* Defendants chose not to timely produce or supplement discovery as required by the Federal Rules. In essence, Defendants now complain that their own documents were not timely used against them by the expert. Defendants' circular argument defies logic, and as discussed more fully below, it is nearly impossible to imagine prejudice as a result of the expert reviewing and using Defendants own information to support his original opinions.

B. Hendricks' Supplemental Report is Timely

In the instant case, discovery is stayed and no scheduling order exists, which necessarily includes a trial date. (Doc. 189.) The parties are developing an agreed proposed scheduling order, which allows Defendants time to respond to any concerns they might have about time needed to further depose Hendricks. As such, with regard to timeliness, there is no question the Supplemental Report is timely.

C. Defendants' Reliance on Fed. R. Civ. P. 16 is Misplaced Because Hendricks' Supplemental Report is Proper and Timely. However, if the Court Finds Plaintiffs Failed to Comply with the Initial Case Schedule, Plaintiffs Diligently Pursued Discovery and there is no Prejudice as a Result of Hendricks' Supplemental Report.

Fed. R. Civ. P. 16(b)(4) allows for the modification of the case schedule for "good cause" shown and with the judge's consent. Here, in contrast to the cases cited by Defendants, Plaintiffs did not request additional time for their expert disclosure and the Court did not deny any such request. See e.g. *Moore v. Indus. Serv. of Tenn.*, 570 Fed. Appx. 569 (6th Cir. Jul. 1, 2014) (affirming the district court's denial of new scheduling order under abuse of discretion standard).

Instead, as set forth above, Plaintiffs complied with the Case Schedule by submitting Hendricks' Affidavit, with the warning to Defendants that a supplement would be forthcoming as discovery progressed. As such, Defendants' reliance upon Fed. R. Civ. P. 16 is misplaced.

However, should the Court find Plaintiffs failed to comply with the initial case schedule, Hendricks' Supplemental Report should not be excluded because Plaintiffs were diligent in pursuing discovery and there is no prejudice to Defendants, who not only possessed and withheld the documents that necessitated the supplement but were directly informed by Plaintiffs' counsel a supplement would be necessary as discovery progressed.

1. Plaintiffs Have Acted with Due Diligence and Show Good Cause for the Timing of Hendricks' Supplemental Report.

Plaintiffs have acted with due diligence prosecuting this case. The relevant history of Plaintiffs' diligence can be summarized as follows:

- Plaintiffs' filed their original Complaint naming as Defendants UDS, New Wave Lending Corp., Benjamin Rodriguez (owner of New Wave) and MTC Texas Corp., dba Masada Group (these companies were identified on the named Plaintiffs' credit reports). (Doc. 1.)

- April 30, 2014 Plaintiffs' filed their First Amended Complaint. (Doc. 18.)

- Plaintiffs served a subpoena to Equifax seeking the identity of any entity to whom Equifax provided the consumer credit reports on September 3, 2014 (Exhibit 3).

- On October 6, 2014, Jason Esteves who is corporate counsel for Equifax, Inc., responded to the subpoena indicating Equifax did not have any identifying information or even have a relationship with Masada Group (Exhibit 4).

- On October 28, 2014, Equifax's counsel, via a telephone call to Plaintiffs' counsel, provided additional information regarding the subpoena request indicting Masada was in fact Name Seeker, Inc. This only occurred after many months of follow up by Plaintiffs' counsel even though this information was likely readily available to Equifax all along.

- Shortly thereafter, on December 1, 2014, Plaintiffs filed their Second Amended Complaint (adding Equifax, Name Seeker and AMG Lead Source and substituting out MTC Texas Corp, dba Masada Group) (Doc. 47.)

- On May 20, 2015, Plaintiffs sent their first set of interrogatories and production of documents to Equifax.

- On July 22, 2015, Plaintiffs issued their first set of interrogatories and production of documents to Name Seeker.

- On June 16, 2014, Plaintiffs issued their first set of interrogatories and production of documents to UDS. (Doc. 25.)

- On July 31, 2015, Plaintiffs issued their first set of interrogatories and production of documents to AMG.

- July 6, 2015, Defendant Equifax produced discovery responses.

- On September 29, 2015, Defendant Equifax produced its first set of documents to Plaintiffs.

- On April 27, 2016, Equifax produced a second set of documents which included EIS-BLASI-001466 to ESI-BLASI-001691.

- On July 14, 2016, Equifax produced its second supplemental document production.

- On August 12, 2016, Equifax produced its third supplemental production of documents.

- On September 21, 2016, Equifax issued a supplemental response to the discovery requests first served on May 20, 2015.

- On March 9, 2016, Name Seeker responded to Plaintiffs' re-issued set of interrogatories.

- On March 16, 2016, Name Seeker produced its first set of documents to Plaintiffs.

- On August 11, 2016, Name Seeker produced its supplemental production of documents to Plaintiffs.

- On August 26, 2014, Defendant UDS produced its initial discovery responses which did not include any production of documents. Counsel for Plaintiffs and UDS engaged in negotiations over the next four months in order to resolve discovery disputes relating to the requests for production of documents, and were able to resolve most issues. As such, UDS produced its first set of documents to Plaintiffs on or about December 2, 2014.

- Based upon the fact AMG was no longer in business, Plaintiffs reached agreement with AMG whereby AMG shared information relevant to the case, including Don Marasco executing an Affidavit, and Plaintiffs dismiss their claims against AMG.

- On May 13, 2015 Plaintiffs retained expert Evan Hendricks.

- January 22, 2016 Plaintiffs filed their Motion for Class Certification including attachment of Affidavit of the opinions of Evan Hendricks. (Doc. 112 and 113.)

- In February of 2016, Defendants' counsel began requesting the discovery deposition of Evan Hendricks. Throughout the next couple of months, all counsel continued to work on scheduling Mr. Hendricks' deposition and ultimately it was scheduled for May 26, 2016.

- In February 2016, all counsel began coordinating schedules for various depositions, including Mr. Hendricks' deposition. On April 15, 2016, Plaintiffs' counsel communicated by email that Hendricks would be made available but suggested defense counsel wait to depose Hendricks until after the additional promised discovery is delivered to Plaintiffs' counsel (Exhibit 5).

- March 16, 2016 Plaintiffs voluntarily dismissed their claims against New Wave, Rodriguez and AMG. (Doc. 118.)

- On May 26, 2016, Defendants' counsel took the discovery deposition of Evan Hendricks.

- June 8, 2016, Plaintiffs deposed Kirk Lanahan of UDS. (Doc. 152.)

- The deposition of David Melrose was scheduled for June 9, 2016 but counsel for Mr. Melrose cancelled the deposition late on June 8, 2016 due to a medical emergency.

- On July 15, 2016, the parties deposed Benjamin Rodriguez.

- Plaintiffs' counsel reviewed the newly produced discovery and provided the new/supplemental discovery to Hendricks on September 1, 2016.

- On November 8, 2016, all Parties agreed to a stay of case proceedings, including discovery at the request of Defendants. (Doc. 189.)

- On December 19, 2016, Evan Hendricks issued his supplemental report to Plaintiffs' counsel; Plaintiffs' counsel immediately delivered the supplemental report by email to Defendants' counsel (Exhibit 6).

When the evidence supported that parties were not necessary for these proceedings, they were dismissed or substituted. When the evidence supported inclusion, parties were added.

Prior to the February 1, 2016 deadline to submit expert reports, Plaintiffs' counsel produced Hendricks' Affidavit which, as already laid out, meets the Rule 26 requirements of an expert report. While Plaintiffs anticipated the possible need for a supplemental report, given their expectation that Defendants would be providing further discovery, and communicated this possibility to Defendants' counsel early on, it was not until Defendants actually produced the additional discovery that Plaintiffs and their expert were reasonably in a position to determine whether a supplemental report was necessary.

After receiving the additional voluminous discovery from Defendants, Plaintiffs' counsel promptly reviewed the newly produced discovery documents and provided the documents to their expert for review. Hendricks determined that the newly produced discovery provided many new documents relevant to the case and his analysis. Without changing his opinions, Hendricks determined that a number of the newly produced documents confirmed his earlier opinions that Defendants Equifax and Name Seeker knowingly failed to satisfy due diligence. Hendricks then promptly issued his supplemental report, which Plaintiffs' counsel delivered to Defendants' counsel. When Plaintiffs produced Hendricks' supplemental report to Defendants' counsel, the case was already stayed by agreement of the parties, with further agreement that a new case schedule would be set after discovery issues involving Name Seeker and AMG were resolved. As of this responsive filing, the new case schedule has yet to be set, further showing no prejudice to Defendants.

The timing of the reports was based upon the discovery produced by the Defendants. Plaintiffs did not seek an extension of the February 1, 2016 disclosure deadline because, while the Plaintiffs expected they did not have all of the discovery from the Defendants, their expert was comfortable rendering opinions based upon the discovery they had received to that point. Hendricks' expert Affidavit was produced before the expiration of the applicable disclosure deadline. Until they received the voluminous additional discovery from Defendants, namely from Equifax, Plaintiffs and their expert were not in a position to determine the necessity of a supplemental report. Defendants would want this Court to believe that Plaintiffs and their counsel were inactive and silent during this entire process. Nothing could be further from reality, as the above due diligence summary shows.

A critical factor in determining due diligence and "good cause" is whether the new report or pleading is based upon newly discovered information. *Leary v. Daeschner*, 349 F.3d 888, 906 (6th Cir. 2003); *Ross v. American Red Cross*, 567 Fed. Appx. 296, 306 (6th Cir. 2014). Here, Plaintiffs produced a supplemental report of their expert within 90 days of receiving Equifax's latest supplement to interrogatory answers and approximately 120 days after receiving Equifax's latest supplement production of documents (thousands of pages of supplemental documents). Hendricks' Supplemental Report specifically cited a number of documents that Plaintiffs first received as part of Defendants' supplemental document production. (Doc. 211-5.) Unlike many of the cases cited by the Defendants within their motions, this was not a case where a supplemental report (or amended pleading) is based upon the same facts and documents that were in possession of all parties long ago.

In short, Hendricks' Supplemental Report is a response to the voluminous supplemental discovery produced by Defendants. Following Defendants' logic, Plaintiffs should have just ignored the additional discovery that was produced and limited themselves to the initial and inadequate discovery provided by Defendants. Indeed, Plaintiffs followed up numerous times with Equifax, in particular, to obtain the thousands of pages supplemental discovery, including relevant portions of the policy and procedure manual, internal emails, and end-user verification documentation. Should Defendants succeed in getting Hendricks' reports stricken, they will be rewarded for their delay in producing a large volume of documents relevant to the heart of this case. Plaintiffs and their expert were simply responding to the evidence as it was received during the normal course of discovery.

2. Defendants are not prejudiced by the timing of Hendricks' Supplemental Report.

As this Court stated, "[s]everal factors may impact the Court's exercise of discretion when weighing potential penalties for discovery violations, including:

(1) The importance of the evidence;

(2) The prejudice to the opposing party of allowing the use of the undisclosed evidence;

(3) The possibility of curing the prejudice;

(4) The explanation, if any, for the party's failure to disclose the evidence; and

(5) The extent to which allowing the evidence would disrupt the trial."

Lienguard at *6-7 (internal citations omitted). Moreover, "the primary inquiry should focus on distinguishing harmless failures to disclose from prejudicial non-disclosures. There should be a direct relationship between the time before trial and findings of prejudice – as the trial date gets closer, the Court should be more critical of non-disclosures." Id. (citing 6-26 Moore's Federal Practice - Civil §26.27; *Tarlton v. Cumberland County Correctional Facility*, 192 F.R.D. 165 (Dist. N.J. 2000)). Defendants stretch to argue they are prejudiced by the timing of Hendricks' Supplement Report.

First, as already discussed, the timing of the Supplemental Report was determined by the timing of the supplemental production of thousands of documents by Defendants.

Second, Defendants may wish to depose Hendricks a second time, and as offered by Plaintiffs' counsel, would have every right to depose Hendricks concerning his Supplemental Report – that they would be prejudiced by doing this is not supported by the facts. Plaintiffs' counsel suggested holding off the first discovery deposition of Hendricks until after Defendants produced the expected additional discovery. Defendants chose to move forward with the deposition. Defendants cannot now claim surprise and prejudice because they opted for this approach when they elected to depose Hendricks in May 2016. In any event, Plaintiffs offered to make Hendricks available when they provided the Supplemental Report. Defendants responded by filing their motions to strike.

Third, the Supplemental Report was produced while the case schedule was stayed. At the time of this Memorandum, no new case schedule has been set by this Court. In cases where prejudice is found to exist, including those cited by Defendants within their Motions, the discovery cut-off has usually expired and trial approaches. Here, because the case has been stayed, there is currently no discovery cut-off or scheduled trial date that limits any Defendant's time to examine and/or respond to Hendricks' supplemental report. When the parties are not dealing with a discovery cut-off or trial date, a finding of prejudice is not convincing. See e.g. *Lienguard* at *12 (declining "to take the extreme action of striking the supplemental expert report."); *Security Insurance Co. of Hartford v. Kevin Tucker & Associates, Inc.*, 64 F.3d 1001, 1009 (6th Cir. 1995); *Carrizo LLC v. City of Girard, Ohio*, 661 Fed. Appx. 364, 368-69, 2016 U.S. App. LEXIS 0547N (6th Cir. Sept. 26, 2016) (distinguishing its facts from those in *Security Insurance*).

D. If this Court Decides Plaintiffs' Supplemental Report is a New Report, and thus Untimely, the Submission was Substantially Justified and Harmless.

If this Court deems the initial 26(a) report non-compliant, or the supplemental report a "new" report, Plaintiffs respectfully submit the tardiness was substantially justified and harmless. Either of these grounds create an independent reason for denying the Motions to Disregard and permitting use of the Supplemental Report. In *Howe v. City of Akron*, 801 F.3d 718 (6th Cir. 2015) ("*Howe*"), the Sixth Circuit expressly adopted the Fourth Circuit's rationale in assessing whether an omitted or late disclosure is "substantially justified" or "harmless." *Howe, supra,* 801 F.3d at 748.

Specifically, the Sixth Circuit asserted "the Fourth Circuit considers five factors, which we now also adopt:

1. The surprise to the party against whom the evidence would be offered;
2. The ability of that party to cure the surprise;
3. The extent to which allowing the evidence would disrupt the trial;
4. The importance of the evidence; and
5. The nondisclosing party's explanation for its failure to disclose the evidence."

Howe at 748 (internal citation omitted).

In this case, every factor favors allowing Plaintiffs' to use the Supplemental Report. In *Howe*, the Court found the Defendant City of Akron was aware that the Plaintiffs relied upon certain back-pay calculations throughout the discovery period, but considered using a different method to calculate back pay than the method used throughout the entire discovery process. Id. Thus, the Court weighed this factor in Plaintiffs' favor because Akron was aware Plaintiffs *might* reconsider their methods. Id. at 748.

In this case, Plaintiffs informed Defendants from very early on they intended to have Mr. Hendricks supplement his expert report. Plaintiffs' Counsel made Defense Counsel aware of this on numerous occasions leading up to Mr. Hendricks' deposition, and Mr. Hendricks mentioned his need for more discovery and his intent to supplement no less than 8 times during his deposition. (Hendricks Dep. at 9:12-16; 10:2-4; 18:21-24; 19:10-12; 45:16-20; 46:1-4; 53:21-25; 138:24.) In short, not only were Defendants aware of Plaintiffs' intent to use an expert, his identity, basic opinions and credentials, but Defendants were also aware Mr. Hendricks would supplement his report after obtaining additional discovery.

The second factor is to determine whether Defendants have an adequate opportunity to remedy the surprise, if in fact any surprise exists. *Howe* at 748. Here, as stated above, Defendants cannot reasonably argue they were surprised by the Supplemental Report. However, even if an element of surprise did exist, there is ample opportunity to cure or remedy the surprise as there is currently not a working scheduling order.

Third, would the introduction of the evidence disrupt the hearing or trial? As stated above, there is currently not a working scheduling order. As such, it would be disingenuous to even argue the introduction of the Supplemental Report at issue would disrupt a trial date that has not even been set. In *Howe,* Plaintiffs disclosed revisions to their damage computations during the pretrial conference. Id. at 749. The Sixth Circuit reasoned that since the retrial had not yet commenced prior to the disclosure, "Plaintiffs untimely disclosure did not significantly impact the trial." Id.

Fourth, a court must consider the importance of the evidence excluded. Id. at 748. Here, Mr. Hendricks' opinions and reasoning will be crucial in assisting the jury with understanding the reasonableness, or lack thereof, of Defendants' procedures and their diligence, or lack thereof, in following such procedures.

Finally, a court must consider the Plaintiffs' explanation for a late disclosure. Id. at 748. In *Howe*, the Court opined that "[n]evertheless, we believe that the record suggests that the Plaintiffs' late disclosure was more likely the result of negligence, confusion, and the lack of information than underhanded gamesmanship." Id. at 749. While it appears the Sixth Circuit emphasized the lack of underhanded gamesmanship in reaching its conclusion, the Court also relied on the fact that Akron refused to provide information until the very last day, which then delayed Plaintiffs calculations as they needed the data Akron refused to provide to perform the calculations. Id. Similarly, Defendants have not suggested Plaintiffs have engaged in any type of underhanded gamesmanship, and there is no evidence whatsoever to support such a contention.

Also similar to the facts in *Howe*, Equifax supplemented its discovery answers and production of documents on multiple occasions – the latest on September 21, 2016. Mr. Hendricks relied on the information supplied by Equifax over a year after Equifax represented in its verified discovery responses that "to the extent they exist, [referring to the requested documents] it will produce non-privileged responsive documents during the relevant time period in its possession, custody or control." (Doc. 211-2.) Equifax represented this in its response to Plaintiffs' Requests for Production of Documents in Requests 1, 2, 3, 6, 14, 15, 17, 18, 26 and 27. Id. Given these similar facts, this Court should rule as the *Howe* court did, permitting late disclosure.

Equifax cites *Tanner v. Grand River Navigation Co.,* 2015 U.S. Dist. LEXIS 164841, 2015 WL 8310291 (E.D. Mich. Dec. 9, 2015) ("*Tanner*"), in support of its argument that Plaintiffs "new" report was not substantially justified. (Doc. 211 at 23.) However, in *Tanner*, the court only listed one reason the report was not substantially justified—namely, "[a]ll of the information upon which Mr. Ancell based his supplementation was available at the time initial disclosures were due…Plaintiff's supplementation therefore cannot be said to 'include information thereafter acquired' or to be a genuine attempt to remedy previously 'incomplete or incorrect information under Rule 26(e)(1). *Tanner, supra,* 2015 U.S. Dist. LEXIS 164841 at *9. The *Tanner* court also pointed out the supplementation was submitted three weeks after discovery had closed and a week before dispositive motions were due. Id. at *6.

Here, the vast majority of facts contained in the Supplemental Report were derived from Equifax's multiple supplemental production of documents, which occurred after the initial disclosure deadline. In addition, the deadlines that concerned the *Tanner* court are not present in this case and there is no working scheduling order with any dates as of the filing of this Memorandum.

The instant case is much closer to *Balimunkwe v. Bank of Am.*, 2015 U.S. Dist. LEXIS 117980, *17, 2015 WL 5167632 (S.D. Ohio Sept. 3, 2015) (citing *Borg v. Chase Manhattan Bank U.S.A.*, 247 F. App'x 627, 637 (6th Cir. 2007). In *Balimunkwe,* even assuming the plaintiff failed to timely disclose his expert report, the court found exclusion of plaintiff's handwriting expert testimony and report was not warranted under either Rule 37(c)(1) or Rule 16(b)(4). *Balimunkwe*, *supra*, 2015 U.S. Dist. LEXIS 117980 at *17. Since the report gave defendants notice of the identity of plaintiff's expert, the opinion he would render, and his credentials, the court allowed the supplemental report filed six months past the deadline. *Balimunkwe* at *17. It does not appear the *Balimunkwe* court analyzed the facts under the *Howe* standard, but the Court did take notice of factors that tend to fit within the five factor analysis of *Howe.*

Specifically, the *Balimunkwe* court noted: "… defendants do not allege that they have been harmed by plaintiff's delay in supplementing the expert report. Plaintiff produced the supplemental report before the discovery deadline had passed, more than two months before expiration of the dispositive motion deadline, and over six months prior to the tentatively scheduled trial date." Id. at *19. Moreover, in *Balimunkwe*, the court concluded "defendants were well aware of the contents of the report in ample time to conduct discovery on the report and to address the report in their motion for summary judgment." Id.

Here, the expert Affidavit was filed prior to the expiration of the expert disclosure deadline, listed the identity of the expert, his opinions, his credentials and the compensation he was being paid. Further, there is currently no scheduling order and Defendants have recently made Plaintiffs aware they believe the discovery stay that was recently lifted should be reinstated. Currently, there are no deadlines. There is no scheduled trial date. Defendants were provided the supplemental report almost three months ago with a commitment from Plaintiffs to make their expert available should Defendants seek to re-depose him. The deadline for Defendants to name their experts has not been set to date.

In summary, based upon the *Howe* and *Balimunkwe* opinions, even if this Court concludes the Supplemental Report is a new report, Plaintiffs' disclosure is substantially justified and harmless.

E. Neither Hendricks' Expert Affidavit nor His Supplemental Report is Preliminary in Nature so as to Justify Exclusion.

In its Motion, Name Seeker argues that Hendricks' Affidavit and supplemental report must be stricken because they are preliminary in nature. In support of its argument, Name Seeker cites *Salgado v. General Motors Corp.*, 150 F.3d 735 (7th Cir. 1998). The case is distinguishable.

Specifically, in *Salgado*, counsel essentially acknowledged the produced expert report was insufficient under Rule 26, relying upon a claimed agreement made with opposing counsel that the expert report would be preliminary in nature. However, opposing counsel was adamant that no such agreement existed.

Further, the *Salgado* court did not permit a supplemental expert report because, as in many of the other cases cited by Name Seeker and Equifax, the discovery deadline had passed and it was clear that the evidence relied upon by the expert in the supplemental report was available to all parties long before the deadline for initial expert report disclosures. *Salgado, supra*, 150 F.3d at 738, 742-743.

The Defendants' worry over the "vicious cycle" (Doc. 214 at 4) of ongoing expert reports is transparent and self-serving. Defendants want to have it both ways. They wish for this Court to ignore or minimize the relevance of the timing and volume of their supplemental discovery production while at the same time criticizing Plaintiffs for not producing an initial report that addressed all the evidence (including the evidence that first became available to the Plaintiffs after issuing the first report and after the disclosure deadline) and criticizing the timing of Plaintiffs' supplemental report.

F. Hendricks Affidavit And Supplemental Report Provide Proper Expert Conclusions In Accordance With Fed. R. Evid. 702.

Despite Name Seeker's arguments to the contrary, Hendricks' opinions presented within his Affidavit and supplemental report are not improper legal conclusions and do not usurp the role of the Court and the jury (Doc. 214 at 5). Again, the case law cited by Name Seeker involves facts that are clearly distinguishable from the circumstances of this case. For example, Name Seeker relies upon the 6th Circuit's decision in *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1994). In *Berry*, the court excluded an expert's opinions where the expert did more than state opinions that suggested the answer to the ultimate issue. The expert in *Berry* was found to have testified on the ultimate question of liability, essentially inserting himself into the role of the jury as the ultimate decision maker.

Interestingly, the Sixth Circuit in *Berry* made clear that "an expert's opinion may 'embrace an ultimate issue to be decided by the trier of fact,'" so long as the issue embraced is a factual one. *Berry, supra*, 25 F.3d at 1353. The court went on to explain that "[w]hen the rules speak of an expert's testimony embracing the ultimate issue, the reference must be to stating opinions that suggest the answer to the ultimate issue or that give the jury all the information from which it can draw inferences as to the ultimate issue." Id. As succinctly summarized by the court, a fingerprint expert is permitted to testify that a defendant's fingerprint was the only print on the murder weapon, but the rules do not allow the expert to opine that a defendant was guilty. Id.

Hendricks' opinions in this case, presented within his Affidavit and Supplemental Report, meet the standards put forth by the 6th Circuit and the Federal Rules of Evidence. As already detailed, Hendricks' opinions are that Equifax and Name Seeker missed and/or disregarded numerous red flags that New Wave Lending was accessing consumer reports for an impermissible purpose and that Equifax failed to follow and/or disregard its own procedures for ensuring that consumer reports were only accessed for a permissible purpose. Hendricks identifies the documents he relied upon to form the bases of his opinions. Hendricks' opinions may embrace the ultimate issues to be decided by the jury, but Hendricks, unlike the expert in *Berry* and those in the other cases cited by Name Seeker, does not try to be the expert and the jury. Hendricks' opinions do not go so far as to usurp or undermine the role of the jury. Rather, Hendricks' opinions are relevant and should be found to be admissible because they meant to aid the jury in their deliberation.

CONCLUSION

Defendants Equifax and Name Seeker ask this Court to strike expert opinions on the grounds that they are incomplete and late. They are neither. Therefore, for all of the foregoing reasons, Defendants' Motions (Docs. 211 and 214) should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 22, 2017, the foregoing was filed using the Court's ECF system, which will send notice of filing to counsel for all parties.

/s/ Robert J. Wagoner

Robert J. Wagoner (0068991)

EXHIBIT 1

Q. But you had no independent knowledge of doing business with AMG?
A. No.
Q. Did you provide any comments or edits to the affidavit before you signed it?
A. No.
Q. Did you read it before you signed it?
A. Yes.
Q. Did you enter into any written agreements with plaintiffs' counsel that obligated you to provide that affidavit?
A. No.
Q. I'm sure my co-counsel will probably talk to you a little bit, excuse me, about that affidavit in more detail. I just want to ask a couple of quick questions about the substance of the affidavit, if I might?
A. Okay.
Q. If you look at paragraph 3, I think that's the first reference to an AMG lead source. Do you see that?
A. Yes.
Q. So as you sit here today, do you have any independent recollection of conducting business with AMG?

A. No.
Q. To the extent you had conducted any business with AMG, that would have been in your capacity as the owner of New Wave. Correct?
A. Yes.
Q. And New Wave is based in Ohio?
A. Yes.
Q. So if New Wave had done business with AMG, you -- for all intents and purposes, New Wave would have been AMG's customer. Is that right?
A. Yes, from what I know about them, if they're a data distributor or lead distributor.
Q. Tell me more about that.
A. What?
Q. Well, you said from what you know about them "if they're a data distributor or lead distributor."
A. That's all I know about them.
Q. Okay. Do you understand how that process works, data distribution or lead distribution with respect to prescreened consumer lists?
A. I believe so.
Q. Can you just give me a general idea of your understanding of that process?
A. Well, in most cases they're just like a broker. They are brokering a list from a source that

compiles it, so...
Q. Okay.
A. That's my understanding of it.
Q. So the way the process works would be New Wave would contact AMG as the broker. Correct?
A. Yes.
Q. And then AMG would contact somebody to obtain the list. Correct?
A. Yeah. I wouldn't necessarily say contact. They probably just have the ability to procure the lists.
Q. Okay.
A. You know, they have the relationship set up, I would assume. I don't know exactly how it works.
Q. Okay. Fair enough. I'm just asking for your best recollection.
A. Yeah.
Q. So -- but in that relationship, that's kind of linear in the sense of you would have only dealt with AMG. Correct?
A. Yes.
Q. Now, looking at paragraphs 4 through 6, correct me if I'm wrong. I don't want to put words in your mouth here, but this suggests to me that you are saying that AMG committed fraud by using your

company's identity. Is that a fair statement?
A. Yes.
Q. And when did you first learn of this?
A. From this case, when they got a statement from him admitting it, the owner of the company admitting that he did it.
Q. "They" being plaintiffs' counsel?
A. Yes.
Q. And "owner of the company" being Don Marasco, owner of AMG?
A. Yes, I'll take your word for it.
Q. Okay. And I believe you said when you first learned of this, your reaction was -- I won't repeat your exact words for you, but pretty harsh. You were upset?
A. Yes.
Q. So would you -- is it a fair statement -- I mean, it is AMG's fault you were brought into the lawsuit in the first place. Right?
A. Yes.
Q. I mean, they stole your identity. Correct?
A. Yes.
Q. And then --
A. From what I know. I mean, this is what has been told to me, you know, so -- from this case, from

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the facts of the case coming together.
Q. And they tried to, you know, conceal the fact that they were obtaining lists on your behalf. Right?
A. Yes.
Q. Have you considered suing AMG?
A. Yes.
Q. Are you in the process of suing them? Are you going to sue them?
A. No. Well, am I going to sue them? I don't -- that's to be determined. He probably doesn't have anything to get from a lawsuit. I think he should be prosecuted criminally, so I definitely want to see him be prosecuted criminally and potentially sued in a civil situation, so...
Q. Well, in terms of the criminal aspect of it, have you made any efforts in that regard, reported AMG to, you know, some authorities or anything like that?
A. I have not yet, but I plan on doing it.
Q. If you do so, can you let us know --
A. Yes.
Q. -- when you do? All right.
Now, looking at paragraph 8 of your affidavit, it says you were never contacted by Name

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Seeker or Equifax to confirm that New Wave was the end user of the reports at issue. Do you see that?
A. Yes.
Q. First of all, who is Name Seeker?
A. From what I understand, they are a party to the case that may have had a part in the process of brokering the data. I'm not exactly sure who they are or, you know, what they did, but that's what I understand.
Q. And your understanding again comes from plaintiffs' counsel?
A. Yes.
Q. Is it also your understanding that AMG was obtaining the consumer data at issue from Equifax through Name Seeker?
A. I don't know.
Q. To the extent they did, they were lied to by AMG about who the end user was. Correct?
A. Well, I never and my company never purchased data from them, at least that I know of, after the end of 2009 or early 2010, so -- and I don't remember ever doing business with them, so definitely anytime after that. Prior to that, you know, like I said, I don't remember. I may have done business with them, but I don't remember.

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Q. Okay. Well, so my question was, you know, to the extent that AMG was obtaining consumer data at issue from Equifax through Name Seeker using your company's identity, they were lying to Equifax and Name Seeker and hiding the fact --
A. Yes.
Q. -- that it was for you. Correct?
A. I'm sorry I interrupted you there. Yes.
Q. As you sit here today, do you have any knowledge whatsoever of what efforts Name Seeker or Equifax took to verify your identify or your company's identity?
A. Equifax, I'm pretty sure, when I first opened my company, they came to -- they came to my office and they had a process for being able to obtain the data and credit reports.
Q. It was a pretty extensive process?
A. A guy came out, looked at our office. I don't remember exactly -- I don't remember everything that he did, but someone came out.
Q. Uh-huh. Would you expect Name Seeker and Equifax to -- you know, once they verified your identity, met with you, to call you every single day?
A. Call me every day?
Q. Sure.

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A. No.
Q. Would you expect them to call you every time you ordered a list through AMG?
A. No. That would be a pretty busy process.
Q. Right. I agree with you there.
Would you also -- would you agree with me that, you know, to verify your identity, there is ways to do that online?
A. Yes.
Q. You could look up your corporate status, for example. Correct?
A. Yes.
Q. And pretty much every state has some way, based on your understanding, to look up whether a corporation has a license or registration to do business in that state?
A. Yes, it's registered with the secretary of state, and if you have a license it would be registered with that regulator or agency, government agency.
Q. So that that would be one way to verify your identity. Right?
A. Yes.
Q. Now, paragraph 9 [sic] in your affidavit says you only order prescreened lists from AMG on one

was half and half.
Q. Okay.
A. In 2007 --
Q. Okay.
A. -- I would say. 2008, I would say it was probably 80 percent conforming.
Q. Okay.
A. And then 2009, a hundred percent.
Q. Okay. And why the change?
A. Mostly because of the change in the market.
Q. Okay.
A. Because nonconforming loan credit dried up pretty much altogether, I mean, completely during that three-year time period.
Q. Okay. And then for prescreened lists, and you described them earlier, the criteria that you used to select for the prescreened lists and --
A. Yes.
Q. -- I think you had indicated that you recalled that one of the criteria was a credit score of 620 or above. Is that correct?
A. Yes.
Q. And then you don't recall any other criteria. Is that correct?
A. No.

Q. Okay. So when you are soliciting to sell loans, you want people that have good to decent credit so that they can be approved for home loans. Is that fair?
A. Yeah, when --
MR. TORO: Object to the form.
Q. (BY MR. GARVINE) I'm sorry?
A. Yes. When we did mainly conforming, yes.
Q. Okay. What were the criteria -- if you recall, what were the criteria when you were using prescreened lists to obtain nonconforming loans?
A. I don't think we used prescreened lists really to do nonconforming. I would say if we did do a nonconforming loan, it would be because someone couldn't qualify for a conforming.
But just based on the information that's in this -- and I don't remember exactly where, but it looks like we were mostly using -- like, for example, with AMG, it was in 2008. So I'm thinking we would have been doing mostly conforming at that point, conforming loans.
Q. Okay. So you don't think that you used prescreened lists for nonconforming. Is that correct?
A. No.

Q. Okay.
A. We would target a certain customer, and then we would have -- maybe we would have some options for them.
Q. Okay.
A. But we would prescreen information to be able to offer them the conforming.
Q. Okay. And on behalf of New Wave did you make the requests of Equifax, or did somebody else do that on your behalf?
MR. HEERINGA: Objection.
A. No, I made all the requests.
Q. (BY MR. GARVINE) Okay. You, exclusively, during the approximately 30 months that New Wave existed?
A. Yes.
Q. Okay. All right. If you can -- let's look at Exhibit 2. This is your affidavit.
If you can look at Exhibit 2 --
A. Oh, yeah.
Q. -- which is your affidavit?
A. Yeah, I've got it right here.
Q. Okay. I think there is a couple things I want to go through.
The first sentence says, "From 2009

through 2012 I was the owner/sole shareholder of New Wave Lending." Correct?
A. Yes.
Q. And should paragraph 1 say, "through the end of 2009, beginning of 2010"?
MR. HEERINGA: Objection to form.
A. Oh, yeah, it should, actually.
Q. (BY MR. GARVINE) Okay. Because I think we've established today that New Wave --
A. I don't know how I didn't pick up on that.
Q. Yeah. So New Wave Lending -- the existence of New Wave Lending was approximately June 2007 through either the end of 2009, beginning of 2010. Correct?
A. Yes.
Q. So the first sentence should say, "From approximately June 2007 through the end of 2009, beginning of 2010 I was the owner/sole shareholder of New Wave Lending." Is that correct?
A. Yes.
Q. And then No. 2 is correct. Is that right? Is paragraph 2 correct?
A. Yes.
Q. Okay. And then is paragraph 3 correct?
A. Yes.

EXHIBIT 2

Brian Garvine

From: Mark Lewis <MLewis@kitricklaw.com>
Sent: Tuesday, May 31, 2016 10:00 AM
To: 'McEntyre, Zach'
Cc: Toro, John; Liz Mote; Brian Garvine; Jeremiah E. Heck; Katherine Wolfe; Robert Wagoner
Subject: RE: Hendricks chronology + discovery

Zach – We will send the flash drive copy to you, as promised.

We're also preparing our letter to you and John concerning outstanding discovery from Equifax, though we understand from your firm's recent representations that we should expect another batch of supplemental discovery very soon, perhaps this week. Is that correct and, if so, can you tell us when to expect the discovery? Once I hear from you, we can decide whether to finalize our discovery letter to you now or simply wait to see how much of the outstanding or additional discovery has been provided. That seems the more efficient route, if we can expect your supplemental discovery this week.

Please let us know when you have a moment.

Thank you,

Mark

Mark Lewis, J.D., LL.M.
Kitrick, Lewis & Harris Co., L.P.A.
445 Hutchinson Ave., Suite 100
Columbus, Ohio 43235
(614) 224-7711
www.klhlaw.com
mlewis@klhlaw.com

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From: McEntyre, Zach [mailto:ZMcEntyre@KSLAW.com]
Sent: Thursday, May 26, 2016 9:13 PM
To: Mark Lewis <MLewis@kitricklaw.com>
Cc: Toro, John <JToro@KSLAW.com>
Subject: Hendricks chronology

Mark: Good to meet you yesterday. During the Hendricks deposition, we asked if plaintiffs would provide us a copy of the flash drive that plaintiffs sent Mr. Hendricks on Saturday, and I think you guys agreed. Please let us know when we can expect to receive the drive. You can send to my attention, or to the attention of my colleague, John Toro, who is copied on this email.

Have a good holiday weekend.

Please let us know when you have a moment.

Thank you,

Mark

Mark Lewis, J.D., LL.M.
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From: McEntyre, Zach [mailto:ZMcEntyre@KSLAW.com]
Sent: Thursday, May 26, 2016 9:13 PM
To: Mark Lewis <MLewis@kitricklaw.com>
Cc: Toro, John <JToro@KSLAW.com>
Subject: Hendricks chronology

Mark: Good to meet you yesterday. During the Hendricks deposition, we asked if plaintiffs would provide us a copy of the flash drive that plaintiffs sent Mr. Hendricks on Saturday, and I think you guys agreed. Please let us know when we can expect to receive the drive. You can send to my attention, or to the attention of my colleague, John Toro, who is copied on this email.

Have a good holiday weekend.

Zach

Zachary A. McEntyre
King & Spalding LLP
1180 Peachtree Street, N.E.
Atlanta, Georgia 30309-3521
T 404.572.4636 | **F** 404.572.5100
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www.kslaw.com/people/Zachary-McEntyre

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Brian Garvine

From: Mark Lewis <MLewis@kitricklaw.com>
Sent: Tuesday, June 14, 2016 11:10 AM
To: 'Toro, John'; McEntyre, Zach
Cc: Liz Mote; Brian Garvine; Jeremiah E. Heck; Katherine Wolfe; Robert Wagoner; Roper, Meryl; Leigh Cordetti
Subject: Blasi - Equifax Discovery Responses

Dear John, Zach and Meryl,

Thank you, John, for your reply below. Before we depose Equifax representatives, we thought it best to follow-up on Equifax's written discovery responses to date. Although we know you are preparing to send us another set of supplemental discovery responses, please consider the following outstanding items based on our review of your formal responses and the roughly 1700 bates-stamped documents you have thus far submitted.

1. Your first set of production responses included **"Name Seeker, Inc. Weekly Usage and Inquiry Reports"** (or similarly named documents) that show the various orders made by Name Seeker. However, the responses did not include the following time periods relevant to the case:

    a. **2007-2013** (with the single exception on document 001397 and 001417 showing orders in June 2011). **Please produce the summaries during this time frame so that the parties can determine New Wave Lending's order activities through Name Seeker or others during this relevant period**.

2. Various Equifax and Name Seeker emails refer to "branch add" procedures, particularly with reference to New Wave Lending after its 2007 member and/or subscriber number had been terminated. See, for example, 001522, 001630. **Please produce all such "branch add" and member/subscriber termination policies and procedures in effect from 2007 to the present. Please note this request is also encompassed by the policies and procedures request below.**

3. In interrogatory 5 answer, your client describes detailed and specific **policies and procedures** for FCRA compliance, including identifying verifying applicants, certifying purposes, conducting audits, reviewing mailers, internal P&P review concerning prescreened lists, etc. However, we did not find any of these policies attached to the interrogatories themselves or later produced with your document production. **Please produce all such policies and procedures in effect from 2007 to the present.**

4. Likewise, your interrogatory 5 answer describes Equifax's procedure requiring applicants to complete an **application form**, followed by credit report, valid business license, bank/business references, and contact information to arrange an on-site visit. **We did not see any such documentation for Name Seeker, AMG lead source, or New Wave Lending. Please produce those documents.**

5. In the same interrogatory answer, your client also describes the verification process for each client, which includes verifying telephone numbers and website, running the names of companies and principals through websites to check for "problem names." Finally, the interrogatory answer indicates that Equifax sends the applicant a package of materials relating to compliance with the FCRA. **Please provide all such records of these policies and procedures having been attempted or completed in this case, along with documentation showing the results of such application and verification processes for the parties/entities involved in this case**.

6. Your Interrogatory 5 answer also mentions various **contracts** between Equifax and its quote **"member companies."** To the extent your prior responses do not contain all such contracts among "member companies" who are parties in this case, please provide in such contracts for Name Seeker, AMG lead source, and New Wave Lending.

7. Your Interrogatory 5 answer asserts that Equifax conducts **on-site inspections** before entering into contracts with applicants. **Please provide all documents concerning any on-site inspections for Name Seeker, AMG Lead Source, and New Wave Lending**.

8. Please identify the **sales agent(s)** responsible for the Name Seeker account from 2007 to the present, as referenced in your interrogatory 5 answer.

9. Also as referenced in your interrogatory 5 answer, please produce any and all **mailers** Equifax and/or its sales agents, including Name Seeker, requested and/or received from AMG Lead Source or New Wave Lending. **Your document production responses imply that Equifax did not review any mailers; if so, please confirm**.

10. In your interrogatory 9 answer, you promise to provide documents identifying inquires on the **class representatives' consumer report from 2009 through 2014**. **Please provide such documents**.

11. In your interrogatory answer 10, you object on relevancy grounds to providing the **filters** used by Name Seeker and the **numbers** of consumers on the associated prescreened lists. We submit that such evidence is relevant to both to certification and merits because it tends to prove the knowledge of potential red flags concerning the type of information request, its likely purpose and/or use, and the total number of consumers affected. **Please provide the request filters and numbers for the lists**. To the extent you still maintain objection based on confidentiality or trade secrets, please note that the agreed order protects the information.

12. In your interrogatory 12 answer, you object to providing the step-by-step procedure utilized with respect to each name representative. You object that the information is confidential and protected trade secret or proprietary information. Please note that the agreed order removes those concerns. You object also that the request is vague and ambiguous. "Step by step procedure" simply means the specific, factual practices that Equifax attempted or accomplished under its policies and procedures when inquiries were made for each of the three named representatives. Finally, this is perhaps among the most relevant information in the case because plaintiffs allege that Equifax failed to adhere to its own policies and procedures. **Please provide the requested specific answer for each named representative's inquiries**.

13. Your interrogatory 15 and 16 answers, you similarly object to providing specific answers for each of the name representatives, and instead refer us to previous answers that generally outline various policies and procedures. However, the question is specific with respect to each named plaintiff and therefore requires a specific factual response. Further, the interrogatories themselves refer verbatim to Equifax's own pleaded defenses and thus do not suffer from ambiguity or vagueness. **Please provide the specific responses to these interrogatories asking for the facts supporting the defenses mentioned in each**.

14. Your answer to interrogatories 19-27 object on the grounds that we have exceeded the permitted number under the Federal Rules of Civil Procedure. We ask that you agree to answer these additional questions without us moving the Court because of the complex nature of this action. We expect that you would agree the Court will likely permit an additional 15 or so interrogatories in a multi-party class action of this nature. **If you refuse to agree to allow the additional questions, please let us know the basis so that we can properly present the question to the Court**.

15. In production response 1, you promise to provide all communications between you and any other party in the action. WE acknowledge that your most recent supplemental discovery contained emails among the various parties, most notably many emails between Equifax and Name Seeker concerning the credentialing and validity of the New Wave orders. **We trust that you will continue to provide such communications, but not limited to emails, if other forms of communication exist. Similarly, we do not see any communications concerning New Wave from 2007-2011 that would include its original credentialing process and its termination as an active member/subscriber. Please provide those as well.**

16. Production request 2 merely asks for the internal Equifax documents promulgating the various policies and procedures your client claims that it generally followed. As we point out with respect to interrogatory 5 above, **please produce such policies and procedures. They bear directly on the claims and defenses asserted in this case**. Their confidentiality is protected by the agreed order.

17. In production response 3, you promise to provide all documents regarding the **boarding process and any audits** to ensure New Wave had a permissible purpose. **We have not received any such documents. Please produce those as well.**

18. In production responses 6-7, you promise to produce **invoices and electronic requests for lists**, among other items. **Please produce such items**. We have not received any to date, despite the agreed order preserving confidentiality.

19. In production response 14, you promise to produce all **training manuals and other material** used to train your employees and others how to handle consumer credit files. **Now that the agreed order has been in place for some time, please produce such documents**. If you still maintain that providing electronic copies of such material would be burdensome, please let us know how we can alleviate that burden. Such information bears directly on both the claims and defenses in this case because plaintiffs allege that Equifax did not follow its own policies and procedures. To the extent you still find the phrase "how to handle consumer credit files," please interpret such language to mean specific training to ensure inquiries are made with permissible purpose and for permissible used under the FCRA.

20. In production response 17, you agree to provide **manuals, bulletins, instructions and the like** to your employees and others concerning **FCRA compliance. Please produce such documents**.

21. In your production response 18, you promise to provide correspondence between you and any other defendant concerning requests for plaintiffs' credit file information and the permissible purpose provided. **To the extent not already encompassed above and in your prior responses, please address this outstanding request as well**.

22. In your production responses 22-23, you object to providing **invoices and billing statements** for both Name Seeker and New Wave on both relevancy and confidentiality grounds. The agreed order addresses confidentiality concerns. Relevancy is established because the invoices and billing records should tend to prove numerosity and commonality. Please provide such records.

23. In production responses 25-26, you indicate that you will produce the entire **Application Packages for Name Seeker and New Wave. Please produce those items**.

We appreciate your attention to these discovery matters. If you would like to confer regarding any of these discovery matters, we can do so any day after the depositions this week, time permitting, or schedule a time in the coming days. Please let me know your preference.

We are independently reviewing your privilege log and will email separately concerning our questions. We will also email our request for specific Equifax employees whose names appear regularly in emails and documents in connection with this case.

Yours sincerely,

Mark

Mark Lewis, J.D., LL.M.
Kitrick, Lewis & Harris Co., L.P.A.

445 Hutchinson Ave., Suite 100
Columbus, Ohio 43235
(614) 224-7711
www.klhlaw.com
mlewis@klhlaw.com

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From: Toro, John [mailto:JToro@KSLAW.com]
Sent: Wednesday, June 1, 2016 6:01 PM
To: Mark Lewis <MLewis@kitricklaw.com>; McEntyre, Zach <ZMcEntyre@KSLAW.com>
Cc: Liz Mote <Liz@kitricklaw.com>; Brian Garvine <brian@garvinelaw.com>; Jeremiah E. Heck <JHeck@lawlh.com>; Katherine Wolfe <kwolfe@lawlh.com>; Robert Wagoner <Bob@wagonerlawoffice.com>; Roper, Meryl <MRoper@KSLAW.com>; Toro, John <JToro@KSLAW.com>
Subject: RE: Hendricks chronology + discovery

Mark:

We do not anticipate finishing our production this week. We are working diligently on that front and expect to complete our document production soon. If you would like to send us a letter regarding discovery in the meantime, we of course would review and consider it.

Please let us know if you would like to discuss.

Best regards,

John C. Toro
King & Spalding LLP
(404) 572-2806

From: Mark Lewis [mailto:MLewis@kitricklaw.com]
Sent: Tuesday, May 31, 2016 10:00 AM
To: McEntyre, Zach
Cc: Toro, John; Liz Mote; Brian Garvine; Jeremiah E. Heck; Katherine Wolfe; Robert Wagoner
Subject: RE: Hendricks chronology + discovery

Zach – We will send the flash drive copy to you, as promised.

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EXHIBIT 3

UNITED STATES DISTRICT COURT

for the

Southern District of Ohio

Peter Blasi, Jr., et al *Plaintiff* v. United Debt Solutions, LLC, et al. *Defendant*	))))))	Civil Action No. 2:14-cv-00083

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: Equifax Information Services, Attn: Custodian of Records
1550 Peachtree Street NW, Atlanta, GA 30309

(Name of person to whom this subpoena is directed)

☑ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material:

See attached Exhibit A

Place:	Date and Time:
Graham & Jensen, LLP, Attn: Raegan King 17 Executive Park Drive, Suite 115 Atlanta, GA 30329	09/22/2014 0:00 am

☐ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: ____________

CLERK OF COURT

____________________ OR ____________________

Signature of Clerk or Deputy Clerk *Attorney's signature*

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Peter Blasi, Jr., et a
____________________, who issues or requests this subpoena, are:

Brain M. Garvine, 5 East Long Street, Suite 1100, Columbus, OH 43215. brian@garvinelaw.com. (614)223-0290

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

EXHIBIT A

On the following dates, Equifax provided prescreened lists of consumers that fit certain criteria to MTC Texas Corp. d.b.a. Masada Group (hereinafter "Masada"). Masada indicated that New Wave Lending Corp. would be the end user of such information. The lists included the following individuals and the transaction was reflected on their Equifax consumer reports as promotional inquiries as follows:

1. **Peter F. Blasi, Jr.**
   a. Name of Company: New Wave Lending Corp-Masada.
   b. Date of Inquiry: 07/30/2013
2. **Jordan J. Brodsky**
   a. Name of Company: New Wave Lending Corp-Masada
   b. Date of Inquiry: 5/30/2012
3. **Michael J. Cassone**
   a. Name of Company: New Wave Lending Corp-Masada
   b. Date of Inquiry: 7/3/2012

Please provide the following information with relation to Masada:

1. Any identifying information, including but not limited to:
   a. Address
   b. Telephone Number
   c. Email Address
   d. Name of the representative to which you provided the lists
   e. IP Address of where you send the lists if applicable
   f. Account Numbers if applicable
   g. Taxpayer Identification Number (TIN) if applicable
   h. Any licensing information provided to you by Masada

Please provide the following information with relation to New Wave Lending Corp.:

1. Any identifying information, including but not limited to:
   a. Address
   b. Telephone Number
   c. Email Address
   d. Name of the representative to which you provided the lists
   e. IP Address of where you send the lists if applicable
   f. Account Numbers if applicable
   g. Taxpayer Identification Number (TIN) if applicable
   h. Any licensing information provided to you by New Wave Lending Corp.

In addition to the above information, please provide any permissible purpose provided to Equifax by either Masada or New Wave Lending Corp., for obtaining the prescreened consumer reports.

AO 88B (Rev 02/14) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action (Page 2)

Civil Action No. 2:14-cv-00083

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* Law Office of Brian M. Garvine, LLC
on *(date)* 09/02/2014 .

X☐ I served the subpoena by delivering a copy to the named person as follows: Tricia Pinkney with the Legal Department of Equifax Information Services
on *(date)* 09/03/2014 ; or

☐ I returned the subpoena unexecuted because: ______________

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
$ ______________ .

My fees are $ ______ for travel and $ ______ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: 09/04/2014

Server's signature

K. Price-Process Server

Printed name and title

367 Athens Highway, Suite 1000, Loganville, Georgia 30052

Server's address

Additional information regarding attempted service, etc.:

EXHIBIT 4

The information contained in this communication may be attorney-client privileged and confidential. This communication is intended only for the individual or entity to which it is addressed. If the reader of this communication is not the intended recipient, or the agent responsible for delivering it to the intended recipient, you are hereby notified that any dissemination, distribution, disclosure, or use of this communication is strictly prohibited. If you have received this communication in error, please notify the sender immediately by telephone, return the original to the sender at the above address via the U.S. mail, and destroy all copies. If you are the intended recipient, but you do not wish to receive communications through this medium, please advise the sender immediately.

From: Jason Esteves [mailto:Jason.Esteves@equifax.com]
Sent: Monday, October 06, 2014 5:20 PM
To: Brian@garvinelaw.com
Cc: Jeremiah E. Heck
Subject: Blasi v. United Debt Solutions

Brian,

Attached is Equifax's response to your request for information. Please let me know if you have any questions.

Thanks,

Jason F. Esteves
Corporate Counsel
Equifax Legal Department
P: 404-885-8109
jason.esteves@equifax.com

EQUIFAX®

Jason F. Esteves
Corporate Counsel

Equifax, Inc
1550 Peachtree St, NW
Atlanta, GA 30309
(404) 885-8109
FAX (404) 885-8800
Jason.esteves@equifax.com

October 6, 2014

Brian M. Garvine
5 East Long Street
Suite 1100
Columbus, OH 43215

Re: ***Blasi, et al v. United Debt Solutions, LLC, et al.*** **– Third Party Subpoena to Equifax Information Solutions LLC**

Mr. Garvine:

I am writing in response to the Subpoena to Produce Information you issued to Equifax Information Services LLC ("Equifax") in *Blasi, et al v. United Debt Solutions, LLC, et al*, 14-CV-00083. In response to your request, Equifax answers as follows:

Masada Group

Equifax does not have identifying information for Masada Group that is responsive to your request. Equifax did not have a relationship with Masada Group during the dates of inquiry identified in the subpoena. As a result, Equifax does not have information related to Masada Group's purported permissible purpose for the inquiries.

New Wave Lending Corporation

Equifax has the following identifying information for New Wave Lending Corporation: 1236 Weathervane Lane, Suites 202-204, Akron, Ohio 44313. New Wave Lending Corporation may also be contacted through its representative, Benjamin Rodriguez at (330) 869-6020. The permissible purpose for New Wave Lending Corporation's inquiries on the dates identified in the subpoena was to obtain pre-approval and pre-screen data for consumers it intended to extend offers of credit.

Please let me know if you have any further questions.

Sincerely,

Jason Esteves

EXHIBIT 5

Jeremiah E. Heck

Subject: FW: Blasi, et al. v. United Debt Services, LLC, et al.

From: Brian Garvine
Sent: Friday, March 18, 2016 11:09 PM
To: Toro, John <JToro@KSLAW.com>; Robert Wagoner <Bob@wagonerlawoffice.com>
Cc: Heeringa, Paul <pheeringa@BuckleySandler.com>; Brian M. Melber <bmm@personiusmelber.com>; Katherine Wolfe <kwolfe@lawlh.com>; Beth-Ann Krimsky <beth-ann.krimsky@gmlaw.com>; Jeremiah E. Heck <JHeck@lawlh.com>; mlewis@klhlaw.com; liz@klhlaw.com; kklingelhafer@fbtlaw.com; McEntyre, Zach <ZMcEntyre@KSLAW.com>; Roper, Meryl <MRoper@KSLAW.com>; Donald.Screen@chandralaw.com; Thoover@hodgsonruss.Com; Oliker, Ashley L. <aoliker@fbtlaw.com>; Lawren A. Zann <Lawren.Zann@gmlaw.com>; rsarkar@mcglinchey.com; Gottlieb, Richard <rgottlieb@BuckleySandler.com>; Caunca, Cecilia <ccaunca@BuckleySandler.com>
Subject: RE: Blasi, et al. v. United Debt Services, LLC, et al.

Counsel - we spoke with Mr. Hendricks today regarding his 4/1 deposition. Mr. Hendricks indicated his opinions could change based upon the depositions of the Equifax, NS and UDS reps. We wanted to provide this information as a professional courtesy.

Mr. Hendricks is available and ready to proceed on 4/1. If we proceed on 4/1, he may need to be deposed again at a later date based upon the rep depos. We can proceed on 4/1. Or we can reschedule his deposition after the reps. Either is fine with us and Mr. Hendricks. Please let us know how you would like to proceed. Thx.

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-----Original Message-----
From: Toro, John [mailto:JToro@KSLAW.com]
Sent: Friday, March 18, 2016 8:18 PM
To: Robert Wagoner <Bob@wagonerlawoffice.com>
Cc: Heeringa, Paul <pheeringa@BuckleySandler.com>; Brian M. Melber <bmm@personiusmelber.com>; Katherine Wolfe <kwolfe@lawlh.com>; Beth-Ann Krimsky <beth-ann.krimsky@gmlaw.com>; Jeremiah E. Heck <JHeck@lawlh.com>; Brian Garvine <brian@garvinelaw.com>; mlewis@klhlaw.com; liz@klhlaw.com; kklingelhafer@fbtlaw.com; McEntyre, Zach <ZMcEntyre@KSLAW.com>; Roper, Meryl <MRoper@KSLAW.com>; Donald.Screen@chandralaw.com; Thoover@hodgsonruss.Com; Oliker, Ashley L. <aoliker@fbtlaw.com>; Lawren A. Zann <Lawren.Zann@gmlaw.com>; rsarkar@mcglinchey.com; Gottlieb, Richard <rgottlieb@BuckleySandler.com>; Caunca, Cecilia <ccaunca@BuckleySandler.com>
Subject: Re: Blasi, et al. v. United Debt Services, LLC, et al.

Jeremiah E. Heck

Subject: FW: Blasi v. United Debt Services, LLC, et al. (Case No. 2:14-cv-00083-GCS-TPK) Deposition and other Scheduling

From: Brian Garvine
Sent: Friday, April 15, 2016 10:02 AM
To: Lawren A. Zann <Lawren.Zann@gmlaw.com>; Toro, John <JToro@KSLAW.com>; Heeringa, Paul <pheeringa@BuckleySandler.com>; Roper, Meryl <MRoper@KSLAW.com>; Katherine Wolfe <kwolfe@lawlh.com>; Beth-Ann Krimsky <beth-ann.krimsky@gmlaw.com>; Jeremiah E. Heck <JHeck@lawlh.com>
Cc: Caunca, Cecilia <ccaunca@BuckleySandler.com>; mlewis@klhlaw.com; liz@klhlaw.com; Lainie@wagonerlawoffice.com; kklingelhafer@fbtlaw.com; McEntyre, Zach <ZMcEntyre@KSLAW.com>; Donald.Screen@chandralaw.com; Eewillison@earthlink.net; Thoover@hodgsonruss.Com; bmm@personiusmelber.com; Gottlieb, Richard <rgottlieb@BuckleySandler.com>; Oliker, Ashley L. <aoliker@fbtlaw.com>; Robert Wagoner <Bob@wagonerlawoffice.com>; rsarkar@mcglinchey.com; Anderson, Debi <DAnderson@KSLAW.com>; Dickinson, Lea <LDickinson@KSLAW.com>
Subject: RE: Blasi v. United Debt Services, LLC, et al. (Case No. 2:14-cv-00083-GCS-TPK) Deposition and other Scheduling

Lawren – thank you for your email. We are very surprised as well albeit for different reasons. I believe Bob's response to Paul adequately addresses the rationale for continuing the depositions.

Please confirm you are not making Messrs. Melrose and Lanahan available for their depositions on 6/2 and 6/3 as previously agreed.

In terms of potentially taking Mr. Hendricks deposition twice, you will recall we provided the professional courtesy of indicating two depositions may be necessary pursuant to the previous order of depositions. The same scenario likely will occur with the current proposed schedule.

The civil rules contemplate this scenario. Per Rule 26(e)(2), "[a]ny additions or changes to this information [i.e. information included in the report and given during the expert's deposition] must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due." Pretrial disclosures under Rule 23(a)(3) are due at least 30 days before trial unless the Court orders otherwise. Rule 26(a)(3) clearly contemplates an expert changing/adding to his testimony pursuant to the discovery process.

We will provide deposition dates for our clients and Mr. Hendricks pursuant to the order requested in John Toro's email if Defendants will agree to not object if Mr. Hendricks deposition needs to be taken again after Defendants' representatives (likely 4-6 depositions including multiple exhibits).

Lawren, in your email below, you discuss several dates. One date you do not discuss is the date for Plaintiffs' Reply in support of our Motion to Certify. Plaintiffs need the depositions of Defendants' representatives for our Reply.

Lawren, your email is also interesting because it appears to unilaterally require the scheduling of nine depositions at Defendants' pleasure (the scheduling of only four of which are in Plaintiffs control) before UDS will even provide dates for its reps. The civil rules do not contemplate or allow for such unilateral control over the scheduling of depositions.

We will send dates for our clients and Mr. Hendricks by the COB next Wednesday (possibly before). If we do not receive dates for Defendants' representatives by that date, we will request a conference with the Court to resolve these issues. There is no reason Defendants cannot provide deposition dates. If any of Defendants require a meet and confer regarding our 30(b)(6) subpoenas, lets promptly schedule. Those issues can easily be resolved in a quick phone conference. Everyone knows what the relevant issues are and the identity of the relevant party/parties to be deposed.

Thank you.

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From: Lawren A. Zann [mailto:Lawren.Zann@gmlaw.com]
Sent: Tuesday, April 12, 2016 7:07 PM
To: Brian Garvine <brian@garvinelaw.com>; Toro, John <JToro@KSLAW.com>; Heeringa, Paul <pheeringa@BuckleySandler.com>; Roper, Meryl <MRoper@KSLAW.com>; Katherine Wolfe <kwolfe@lawlh.com>; Beth-Ann Krimsky <beth-ann.krimsky@gmlaw.com>; Jeremiah E. Heck <JHeck@lawlh.com>
Cc: Caunca, Cecilia <ccaunca@BuckleySandler.com>; mlewis@klhlaw.com; liz@klhlaw.com; Lainie@wagonerlawoffice.com; kklingelhafer@fbtlaw.com; McEntyre, Zach <ZMcEntyre@KSLAW.com>; Donald.Screen@chandralaw.com; Eewillison@earthlink.net; Thoover@hodgsonruss.Com; bmm@personiusmelber.com; Gottlieb, Richard <rgottlieb@BuckleySandler.com>; Oliker, Ashley L. <aoliker@fbtlaw.com>; Robert Wagoner <Bob@wagonerlawoffice.com>; rsarkar@mcglinchey.com; Anderson, Debi <DAnderson@KSLAW.com>; Dickinson, Lea <LDickinson@KSLAW.com>
Subject: RE: Blasi v. United Debt Services, LLC, et al. (Case No. 2:14-cv-00083-GCS-TPK) Deposition and other Scheduling

Hello Brian.

In light of the last few weeks of emails your request comes as a surprise. As a preliminary matter, having monitored this weekend's emails between Bob Wagoner (your co-counsel for Plaintiffs) and Paul Heeringa (for Name Seeker), it must be noted that at no point in time did UDS agree to postpone Evan Hendricks' deposition until after Plaintiffs conduct their respective depositions of Name Seeker, Equifax, or UDS. Similarly, at no point in time did UDS believe the postponement of Plaintiffs' and/or Hendricks' deposition was due to anything other than Plaintiffs' insufficient discovery responses. To the extent Plaintiffs now seek to argue that the depositions of Name Seeker, Equifax, or UDS must occur prior to Hendricks' deposition due to the possibility, albeit improper, that Hendricks' opinions may change based upon the Name Seeker, Equifax, or UDS depositions is unavailing and certainly was never agreed to by UDS; particularly as (1) Plaintiffs deadline to certify a class was September 15, 2015 (which Plaintiffs appear to have unilaterally determined to be January 15, 2016), and (2) Plaintiffs' expert report deadline was February 1, 2016. As I am sure you are aware, all of the foregoing dates have since come to pass. Thus, from UDS' standpoint, the focus should remain on scheduling the depositions necessary for a response to Plaintiff's Motion for Class Certification – Plaintiffs, Evan Hendricks, AMG, Donald Marasco, Sam DeJohn, and New Wave/Ben Rodriguez (the "Class Cert. Response Depositions") – as any suggested dates of availability for other depositions may have to be used for the foregoing Class Cert. Response Depositions. Towards this end, please advise if the dates proposed by John Toro on behalf of Equifax (attached for your convenience) work on Plaintiffs' end. Once the Class Cert. Response Depositions are calendared, we are more than happy coordinating UDS' deposition at a time convenient for all parties. Thank you.

GreenspoonMarder LAW

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EXHIBIT 6

Jeremiah E. Heck

From:	Brian Garvine <brian@garvinelaw.com>
Sent:	Monday, December 19, 2016 10:51 AM
To:	Heeringa, Paul; jtoro@kslaw.com; Lawren A. Zann; 'Roper, Meryl'; 'McEntyre, Zach'; 'Beth-Ann Krimsky'; Gottlieb, Richard E.; 'rsarkar@mcglinchey.com'
Cc:	Jeremiah E. Heck; Katherine Wolfe; 'Liz Mote'; Robert Wagoner; Mark Lewis
Subject:	Evan Hendricks' supplemental report
Attachments:	Blasi - Hendricks Supplemental Expert Report - 12-15-16.pdf

Counsel – attached is Evan Hendricks' supplemental report. If anyone would like to depose Mr. Hendricks while discovery is stayed, Plaintiffs agree to schedule his deposition. Please let us know if you would like to schedule. Thank you.

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